

Attorney General

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Robert E. Corbin

February 29, 1988

Mr. Ron Johnson
Arizona Board of Pardons and Paroles
1645 West Jefferson - Suite 326
Phoenix, Arizona 85007

Re: I88-032 (R87-192)

Dear Mr. Johnson:

You ask whether a member of the Board of Pardons and Paroles ("Board") may work full-time and receive compensation and, as the schedule allows, work and receive compensation as a pro tem Justice of the Peace.

A.R.S. § 38-601 prohibits state employees, including members of boards such as the Board of Pardons and Paroles, from receiving extra or additional compensation in excess of the salary provided by law. A.R.S. § 38-601 provides as follows:

State or county officers, employees, members of boards and commissions, and deputies, stenographers, clerks and employees of any such officer, board or commission, or of any institution, shall receive the salary provided by law, and shall not, under any pretext, receive any salary or emolument in excess of the salary so provided.

A.R.S. § 38-601 and its predecessor have consistently been interpreted in previous Attorney General Opinions to permit the receipt of compensation for performance of the duties of two separate public offices, provided the two positions are not incompatible. Ariz. Atty. Gen. Ops. 187-049; 77-201; 76-41; 70-7-L and 69-24-L; accord, Coleman v. Lee, 58 Ariz. 500, 121 P.2d 433

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(1942) (interpreting the predecessor of A.R.S. § 38-601). However, if the two offices are incompatible, then the officer holding one public office may not accept the second public office and retain both positions. Perkins v. Manning, 59 Ariz. 60, 69, 122 P.2d 857, 861 (1942).

Previous opinions of the Attorney General set forth guidelines for determining whether two public offices are incompatible.

1. Incompatibility of officers or positions:

A. The employment contract or the applicable statutes with regard to the first position must not contain provisions which prevent employment after normal working hours.

B. The performance of the duties of the second position must not in any way interfere with the performance of the regular duties of the first position.

C. It must not be impossible to perform the duties of both positions. This refers not only to a physical impossibility, but also to an inconsistency in the functions of the two positions such as when one is subordinate to the other or when a contrariety and antagonism would result in an attempt by one person to discharge faithfully and impartially the duties of both. The duties performed in the second position must not be performed during the normal working day of the first position unless the member is on vacation or leave time.

D. The two positions are incompatible when the holder can not in every instance discharge the duties of both.

Ariz. Atty. Gen. Op. 70-7-L at 4-5. Even if the duties of the second job are performed during the normal working day of the first job, the

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two positions are not incompatible providing that the employee is on approved leave from the first position.

Ariz. Atty. Gen. Op. 187-049 at page 3.

We have reviewed the statutes governing the duties of board members (A.R.S. §§ 31-401 to -492) as well as the statutes governing Justices of the Peace (A.R.S. §§ 22-101 to -124) and it appears to us that the two positions are not inherently inconsistent or antagonistic. However, we note that A.R.S. § 31-401(B) provides that "[t]he members of the Board shall serve on a full-time basis" (Emphasis added.)

The term "full-time basis" is ambiguous. The term is not defined in Title 31 or any other Title of A.R.S. applicable to the issue at hand. However, one can look to several sources for clues to its meaning in A.R.S. § 31-401(B).

The Arizona Constitution, art. XVIII, § 1 provides that a lawful day's work for a state employee is eight hours, and no more. A.R.S. § 38-401 provides that normal state office hours are from "eight o'clock a.m. until five o'clock p.m. each day from Monday through Friday."¹/ Flex time is permitted by A.R.S. § 23-391(B) which allows "for a work week of forty hours in less than five days for certain classes of employees", and A.R.S. § 41-783(17) which states, "Rules on hours of employment shall provide for four day, forty hour work weeks as an option for employees" None of these statutes apply to the board members of the Board of Pardons and Paroles; however, they do indicate that the framers of the Arizona

¹/In Ariz. Atty. Gen. Op. 58-75, the Attorney General concluded that the Corporation Commission could establish a work schedule for employees from 8:30 a.m. to 5:00 p.m., with one-half hour for lunch, as long as the office remained open for business between the hours of 8:00 a.m. to 5:00 p.m.

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Constitution and the legislature apparently contemplated that a forty-hour work week constitutes full-time work.^{2/}

^{2/}The Fair Labor Standards Act ("FLSA") of 1938 (29 U.S.C. § 207) also provides for a 40 hour work week to be paid at the regular rate and any excess over 40 hours to be paid at a premium rate. The FLSA (29 U.S.C. § 213(a)(1)) exempts "any employee employed in a bona fide executive, administrative, or professional capacity" from its minimum wage and maximum hours provisions. A board member on the Board of Pardons and Paroles certainly serves in such a capacity.

A Board member is denied the opportunity for over-time or compensatory time by A.R.S. § 41-783(25) which states in relevant part:

No over-time or compensatory time may be granted to the following positions and persons:

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(b) All positions which are appointed pursuant to A.R.S. § 38-211.

(c) All professional positions.

(d) Persons whose primary duty is to manage the state agency or state subdivisions, and:

(i) Who use discretionary powers.

(ii) Who direct the work of at least two other employees.

(iii) Who have the authority to hire and fire.

Board members are appointed pursuant to A.R.S. § 38-211, are professionals and satisfy the criteria set out in subsection (d) quoted above.

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Courts of various jurisdictions have acknowledged that the term "full-time" is ambiguous, and their attempts to construe it also give some insight into what may have been contemplated by our legislature in using the term. The Supreme Court of Idaho stated:

Such provision is in its nature somewhat ambiguous, however it does not require the employee to devote 24 hours a day nor every minute of his waking hours to his employment. On the other hand, it undoubtedly does require that the employee shall make that employment his business to the exclusion of the conduct of other business such as usually calls for the substantial part of one's time or attention.

Harrison v. Lustra Corporation of America, 84 Idaho 320, 372 P.2d 397, 400 (1962); see also Transamerica Insurance Company v. Frost National Bank of San Antonio, 501 S.W.2d 418, 423 n. 1 (Tex. 1973) (cannot undertake other duties that would "interfere to any significant extent with such party's performance of the given task."); Hall v. Dawson, 429 S.W.2d 366, 368 (Ky. 1968) ("full time requires engaging in the business substantially all of one's working time."); Johnson v. Stoughton Wagon Company, 118 Wis. 438, 95 N.W. 394, 397 (1903) (full-time does not require "every moment of his waking hours" but a person may engage in activities that "do not trespass substantially upon the ordinary business hours").

We, therefore, think that in requiring that the Board of Pardons and Paroles members shall serve on a full-time basis, the legislature contemplated that their duties would consume 40 or more hours per week. Part-time employment elsewhere would not be prohibited by this provision so long as the other employment did not substantially interfere with performance of Board duties or "trespass substantially upon the ordinary business hours" of the Board. Johnson v. Stoughton Wagon Company.

Sincerely,



BOB CORBIN
Attorney General